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No. 88-402

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MICHIGAN, PETITIONER

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a State may challenge the constitutionality of 18 U.S.C. 2515, which prohibits the introduction into evidence in federal and state proceedings of wire, oral, and electronic communications intercepted in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, by filing a declaratory judgment action against the Attorney General of the United States.

2. Whether 18 U.S.C. 2515 violates the Tenth Amendment to the Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 6
Babbitt v. *United Farm Wrkrs Nat'l Union*, 442 U.S. 289 (1979) 5
Berger v. *New York*, 388 U.S. 41 (1967) 8
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 11
Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) 9, 11
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 11
Katz v. *United States*, 389 U.S. 347 (1967) 8
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 11
Lee v. *Florida*, 392 U.S. 378 (1968) 9
Linda R. S. v. *Richard D.*, 410 U.S. 614 (1973) 4
Mapp v. *Ohio*, 367 U.S. 643 (1961) 8, 9
Marriage of Lopp, In re, 268 Ind. 690, 378 N.E.2d 414 (1978), cert. denied, 439 U.S. 1116 (1979) 10
Michigan v. *Meese*, 479 U.S. 1078 (1987) 2
National League of Cities v. *Usery*, 426 U.S. 833 (1976) .. 10, 11
Rescue Army v. *Municipal Court of Los Angeles*, 331 U.S. 549 (1947) 6
Schwartz v. *Texas*, 344 U.S. 199 (1952) 9
Socialist Labor Party v. *Gilligan*, 406 U.S. 583 (1972) 7
South Carolina v. *Baker*, No. 94 Orig. (Apr. 20, 1988) ... 9-10
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 5
Valley Forge Christian College v. *Americans United for Separation of Church & State*, 454 U.S. 464 (1982) 4
Warth v. *Seldin*, 422 U.S. 490 (1975) 4

Constitution, statutes and regulations: Page

U.S. Const.:
Art. III 6
Amend. IV 3
Amend. X 3, 7, 9, 10
Amend. XIV 11

Federal Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103-1104 9

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. III, 82 Stat. 211 7-8
§ 801(a), 82 Stat. 211 8
§ 801(b), 82 Stat. 211 8

Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, as amended by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, 18 U.S.C. (& Supp. IV) 2510-2520 1-2
18 U.S.C. 2511(1) 2
18 U.S.C. 2515 ..... 2, 3, 4, 5, 6, 7, 8, 9, 10, 11
18 U.S.C. 2518 2

Miscellaneous:

S. Rep. 1097, 90th Cong., 2d Sess. (1968) 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30a-38a) is reported at 853 F.2d 395. The opinion of the district court (Pet. App. 1a-29a) is reported at 666 F. Supp. 974.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1988. The petition for a writ of certiorari was filed on August 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Com-

munications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, 18 U.S.C. (& Supp. IV) 2510-2520, comprehensively regulates the nonconsensual interception of wire, oral, and electronic communications. Section 2518 establishes the procedures through which law enforcement officials may obtain orders authorizing wiretaps. Section 2511(1) makes it a criminal offense, inter alia, to intercept a wire communication without such an order or to disclose or use the contents of a communication that has been intercepted in violation of the Act. Finally, Section 2515 (see Pet. 8) requires the exclusion of "the contents of" an intercepted communication and "evidence derived therefrom" in all state and federal proceedings "if the disclosure of that information would be in violation of" the Act.

2. Petitioner, the State of Michigan, claims to be in possession "of a recording of telephone conversations containing evidence of public corruption" that was "delivered anonymously, and recorded by a person or persons unknown" (Pet. App. 5a). In 1986, a circuit judge in Wayne County, Michigan, quashed subpoenas based on that recording, citing Section 2515 as the basis for his decision (Pet. App. 7a-8a). No appeal was taken from that order. Instead, petitioner sought leave to file an original bill of complaint in this Court attacking the constitutionality of Section 2515. This Court denied that application in February 1987. *Michigan* v. *Meese*, 479 U.S. 1078 (1987).

3. Petitioner then filed this action against the Attorney General in the United States District Court for the Eastern District of Michigan. The complaint sought a declaratory judgment "that 18 [U.S.C.] 2515 is unconstitutional when applied to State proceedings as violative of the Tenth Amendment" (Complaint para. 4). It alleged that the State's claim involved "an actual controversy," since 18 U.S.C. 2515 was "preventing investigation of * * * apparent acts of public corruption" that were reflected in the

recording state authorities had obtained (Complaint para. 10). However, the complaint did not allege that the Attorney General had taken or threatened to take any action to enforce Title III against petitioner or to interfere with the state grand jury's investigation. Thereafter, two individuals, one of whom admitted having participated in the intercepted conversations, were granted leave to intervene as defendants (Pet. App. 9a).

4. The district court granted summary judgment in favor of the Attorney General on the merits of petitioner's claim and dismissed the complaint (Pet. App. 1a-29a).[1] The court observed that this Court was "unlikely to accept the State's [Tenth Amendment] argument," since the Court itself has adopted exclusionary rules, in the context of the Fourth Amendment and the *Miranda* decision, which are binding on state courts even though not constitutionally required (*id.* at 15a-17a). Reviewing the legislative history of Section 2515, the court found that Congress had enacted that provision because it considered "judicial exclusion of improperly obtained communications 'necessary and proper' to execute its other intentions in Title III" (Pet. App. 20a). The district held (*id.* at 21a):

> Where, as here, the State concedes Congress's power (absent consideration of the Tenth Amendment) to enact such a law, the Tenth Amendment does not impose an independent limitation on Congress that permits a court to reject Congress's view that a narrow aspect of a statute is "necessary" to effectively implement its larger purpose.

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[1] The district court had earlier raised the question whether the suit was ripe by issuing an order to show cause *sua sponte*. Both petitioner and the Attorney General expressed the position at that point that the suit was ripe. Pet. App. 6a-9a.

5. The court of appeals affirmed on a different ground, holding that it lacked jurisdiction under Article III (Pet. App. 30a-38a). The court noted that petitioner failed to show that its alleged injury had resulted from any action by the Attorney General, and concluded that the State lacked standing to sue (*id.* at 37a):

> Plaintiff's injury did not result from any action taken by the defendant, the Attorney General of the United States. Rather, it was the state trial court judge who quashed the subpoenas and enforced the federal statute, 18 U.S.C. 2515. The Attorney General has not threatened plaintiff with any penalty for attempting to use the taped conversations which are the subject of this litigation. Plaintiff's remedy is to appeal the state court's decision through the state court system.

ARGUMENT

1. The court of appeals properly refused to reach the merits of petitioner's claim. Petitioner does not and cannot allege that the Attorney General or any of his subordinates has taken any action to enforce Section 2515 against petitioner or to hinder the progress of the state grand jury investigation. Since federal officials are not responsible for any actual or threatened injury to petitioner, petitioner's lawsuit does not present a case or controversy within the meaning of Article III. *Valley Forge Christian College* v. *Americans United for Separation of Church & State,* 454 U.S. 464, 471-472 (1982); *Warth* v. *Seldin,* 422 U.S. 490, 498, 505 (1975); *Linda R. S.* v. *Richard D.,* 410 U.S. 614 (1973). Rather, as the court of appeals noted (Pet. App. 37a), if petitioner was dissatisfied with the state court's decision quashing the grand jury's subpoenas, the proper remedy was to pursue an appeal through the state court system.

Petitioner's reliance (Pet. 53-56) on *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and *Babbitt* v. *United Farm Wrkrs. Nat'l Union*, 442 U.S. 289 (1979), is misplaced. In *Katzenbach*, this Court heard a challenge to various provisions of the Voting Rights Act of 1965. However, by contrast to Section 2515, the Voting Rights Act assigned the Attorney General specific functions in the implementation of the provisions of the Act that were in dispute in *Katzenbach*. Significantly, this Court noted that South Carolina's attack on the criminal provisions of the Act was "premature," since no one had "been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize" (383 U.S. at 317). *Katzenbach* thus recognized that South Carolina could not obtain a determination of the constitutionality of provisions that the Attorney General was not implementing or threatening to enforce. Similarly, in *Babbitt*, this Court entertained a suit challenging certain provisions of Arizona's farm labor statute. However, the named parties included the state authorities responsible for implementing or enforcing those provisions (449 F. Supp. 449, 450 (D. Ariz. 1978)). As in *Katzenbach*, this Court limited its review of the validity of the statute to those specific provisions that state authorities were applying to or threatening to enforce against the plaintiffs (442 U.S. at 297-305). Neither of these cases suggests that a party may adjudicate the constitutionality of a federal statute by seeking a declaratory judgment against the Attorney General when he is not implementing, enforcing, or threatening to enforce the statute.

Contrary to petitioner's suggestion (Pet. 57-58), the fact that two individuals have intervened as defendants does not make petitioner's claims justiciable. The only injury to petitioner alleged in the complaint is the State's difficulty

in proceeding with a grand jury investigation without the use of a recording obtained in alleged violation of Title III of the Act. The complaint does not allege that the intervenors have any practical or legal ability to affect the progress of the investigation that petitioner wishes to pursue. If that investigation has been halted, as petitioner alleges, the cause was the state court's decision to quash the grand jury's subpoenas in reliance on Section 2515, not anything the two individuals have done. Significantly, on the present record this case does not call for review of a specific attempt by these individuals to exclude evidence in any proceeding to which the State is a party.[2]

2. Apart from Article III, the absence of a concrete factual setting for petitioner's challenge to Section 2515 makes this case unsuitable for review by this Court. Petitioner's complaint asserts that Section 2515 is unconstitutional on its face. The record contains no information about the circumstances under which the particular recording that allegedly has occasioned this suit was made or how it was obtained. The case does not arise out of a specific attempt to introduce evidence over a litigant's objection. This Court's cases make clear that the constitutionality of an important federal statute should not be determined in such an abstract setting. *E.g., Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 569 (1947). As the Court stated in

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[2] As the district court observed (Pet. App. 6a & n.3), we opposed the filing of petitioner's original bill of complaint in *Michigan* v. *Meese, supra,* on the ground that the district court was an available and more appropriate forum. However, the argument regarding the relative merits of proceeding in this Court and in the district court obviously expressed no opinion on the applicability of Article III, which would bar a lawsuit of the sort petitioner has brought.

Socialist Labor Party v. *Gilligan*, 406 U.S. 583, 588 (1972) (footnote omitted):

> This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584 (1947). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. *Id.* at 574.

These principles counsel against review of petitioner's broad request for a declaratory judgment that Section 2515 is unconstitutional.

3. In any event, petitioner's arguments on the merits (Pet. 16-51) raise no substantial issue regarding the constitutionality of Section 2515. Congress's authority to prescribe a rule of decision that prohibits the use of the fruits of a federal crime as evidence in state proceedings is not inconsistent with any view of the Tenth Amendment that has been advanced in this Court's cases or with principles of federalism.

There is no dispute that enacting Section 2515 was within Congress's power under the Commerce Clause (see Pet. App. 23a-24a). The Act included Congress's findings that "[w]ire communications are normally conducted through the use of facilities which form part of an interstate network," that "[t]here has been extensive wiretapping carried on without legal sanctions," and that "[t]he contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings" (Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351,

Tit. III, § 801(a), 82 Stat. 211). Congress further found (§ 801(b), 82 Stat. 211):

> In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary * * * to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, [and] to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

See also S. Rep. 1097, 90th Cong., 2d Sess. 69, 90-91 (1968). In Congress's view, Section 2515's suppression remedy was "necessary and proper to protect privacy" and formed "an integral part of the system of limitations designed to protect privacy" (S. Rep. 1097, *supra,* at 96).[3]

Section 2515 was patterned after the exclusionary rule that this Court extended to state proceedings in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and applied to electronic surveillance in *Berger* v. *New York,* 388 U.S. 41 (1967), and *Katz* v. *United States,* 389 U.S. 347 (1967). See S. Rep. 1097, *supra,* at 96. The Act's authors "used the *Berger* and *Katz* decisions as a guide in drafting Title III" (S. Rep. 1097, *supra,* at 75), and believed that Section 2515 "largely reflect[ed] existing law" (S. Rep. 1097, *supra,* at 96; see *id.* at 67-68, 74-75, 96 (reviewing this

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[3] Contrary to petitioner's suggestion (Pet. 35-36), these concerns are not inapplicable when government officials are not involved in wiretapping. Congress could rationally find that the prospect that illegal wiretap evidence might be admissible in court proceedings would provide an incentive for private parties to engage in wiretapping, and that it was necessary to eliminate that incentive.

Court's decisions)). Although Section 2515 went farther than this Court's decisions in some respects, for instance by forbidding the use as evidence of illegal recordings that were created by private parties, Congress nevertheless made use of the same type of exclusionary rule that this Court had already adopted for state proceedings.

This Court has previously acknowledged that Congress has the power to require state courts to exclude unlawfully intercepted communications from their proceedings. In *Lee* v. *Florida,* 392 U.S. 378 (1968), the Court construed the predecessor of Title III, Section 605 of the Federal Communications Act of 1934, ch. 652, 48 Stat. 1103-1104, as prohibiting the admission in state proceedings of evidence derived from illegal wiretapping. The Court found support for its construction of the statute in *Mapp* v. *Ohio, supra,* recognizing that there was an analogy between Congress's and the Court's actions in this area (392 U.S. at 385). Even Justice Harlan's dissent, which disagreed with the majority's decision as a matter of statutory construction, agreed that "Congress has ample power to proscribe any particular use of intercepted telephone conversations" (*id.* at 388 (Harlan, J., dissenting)).[4]

No point of view expressed in any of this Court's decisions under the Tenth Amendment casts any doubt on Congress's power to enact an "evidentiary sanction" to discourage illegal wiretapping. In *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 552, 556 (1985), and *South Carolina* v. *Baker,* No. 94 Orig.,

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[4] *Lee* overruled *Schwartz* v. *Texas,* 344 U.S. 199 (1952), on the statutory question. Even in *Schwartz,* the Court expressed no doubt concerning Congress's power to require the exclusion, in state proceedings, of evidence derived from illegal wiretaps, but held that Congress had not clearly expressed an intention to do so.

(Apr. 20, 1988), Slip op. 5-7, this Court held that the Tenth Amendment establishes structural, not substantive, limits on Congress's authority to regulate interstate commerce, *i.e.*, that States must find their protection from congressional regulation in the political process, not through judicially defined spheres of unregulable state activity. Here, Michigan cannot contend that it was "deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless" when Section 2515 was enacted. *South Carolina* v. *Baker,* slip op. 6. Under the analysis of *Garcia* and *Baker,* therefore, Michigan has no Tenth Amendment claim.

Moreover, contrary to petitioner's contentions, Section 2515 passes muster even under the criteria set out in *National League of Cities* v. *Usery,* 426 U.S. 833, 845, 852, 854 (1976). A statute which prohibits the use of the fruits of a federal crime as evidence in state proceedings does not regulate "the States as States," impair "attributes of [state] sovereignty attaching to every state government," or "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*ibid.*). Section 2515 does not impair the functioning of any state court or other agency as such; it provides a rule of decision indistinguishable from other federal law that state tribunals are required by the Supremacy Clause to apply.[5] In any event, Congress's findings regarding the

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[5] Dicta in *In re Marriage of Lopp,* 268 Ind. 690, 378 N.E.2d 414, 423 (1978), cert. denied, 439 U.S. 1116 (1979), do not support petitioner's position. In *Lopp,* the trial court had received an illegal recording solely for the purpose of passing on a wife's claim that she had been coerced by that recording into signing a separation agreement with her husband. The Indiana Supreme Court held that, as a matter of statutory construction, Section 2515 did not forbid receiving the recording for that purpose. Its decision was carefully limited, and its

prevalence of unlawful electronic surveillance and the need to remove incentives to engage in such practices provide "a federal interest" justifying "state submission." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 288 n.29 (1981). The undoubted constitutionality of Section 2515 under any of the tests this Court has recognized makes it unnecessary to consider what "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause" (*Garcia,* 469 U.S. at 556).[6]

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passing reference to the Tenth Amendment predated this Court's decision in *Garcia.*

[6] It should also be noted that Congress believed that Title III was authorized, at least in part, by Section 5 of the Fourteenth Amendment. S. Rep. 1097, *supra,* at 92 (citing *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966)). That provision gives Congress the power to enforce the Fourteenth Amendment by appropriate legislation. In *National League of Cities,* this Court reserved the question whether the analysis in that case would apply to legislation authorized by Section 5. 426 U.S. at 852 n.17. Cf. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, * * * are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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